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Before The
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the	)	
Local Competition Provisions	)	CC Docket 96-98
in the Local Telecommunications Act of 1996	)	

COMMENTS OF AT&T CORP. ON THE FOURTH FURTHER NOTICE OF PROPOSED RULEMAKING

Pursuant to the Commission's November 5, 1999 *Third Report and Order and Fourth Further Notice of Proposed Rulemaking* ("*Order*"), FCC 99-238, and its November 24, 1999 *Supplemental Order*, FCC 99-370, AT&T Corp. ("AT&T") respectfully submits the following comments on the Fourth Further Notice of Proposed Rulemaking.

INTRODUCTION

The Commission seeks comment on the incumbent LECs' arguments that the "just and reasonable" requirements of section 251(c)(3), section 251(g), or possibly other provisions of the Telecommunications Act, permit the Commission to establish restrictions that would prohibit competitive LECs from using combinations of the loop and transport network elements solely (or predominantly) to provide exchange access services. *Order* ¶ 495; *Supplemental Order* ¶ 6.[1] In addition, the *Order* (¶ 496) requests parties to refresh the record on "whether requesting carriers may use unbundled dedicated or shared transport facilities in conjunction with unbundled

[1] Specifically, the *Supplemental Order* ¶ 6 expanded the scope of the inquiry in the *Order* to seek comment on (1) "whether there is any basis in the statute or our rules under which the incumbent LECs could decline to provide combinations of loops and transport network elements at unbundled network element prices;" (2) "the argument that the 'just and reasonable' terms of section 251(c) or section 251(g) permit the Commission to establish a usage restriction on combinations of unbundled loops and transport network elements;" and (3) whether there is any other statutory basis for limiting an incumbent LEC's obligations to provide combinations of loops and transport facilities as unbundled network elements."

switching to originate or terminate interstate toll traffic to customers to whom the requesting carrier does not provide local exchange service." Neither of the above-cited provisions, nor any other portion of the Act, permits the imposition of any "use" restrictions when a requesting carrier employs one or more unbundled network elements to provide any telecommunications service, including exchange access service.

The Commission also requests comment on (1) the financial impact that resolution of this issue could have on incumbent LECs; and the extent to which any such impact should be considered in reaching a decision on this issue; (2) "the policy implications, if any, of a significant reduction in special access revenues for our universal service program;" and (3) "whether requesting carriers may use unbundled dedicated or shared transport facilities in conjunction with unbundled switching to originate or terminate toll traffic to customers to whom the requesting carrier does not provide local exchange service." *Order* ¶ 496. The short answers to these questions are that any financial impacts on incumbents cannot override the clear statutory prohibition against use restrictions, particularly in light of the other statutory provisions that are designed to address any of the incumbents' legitimate concerns. Moreover, full implementation of the Act will eliminate all concerns about universal service. Further, adoption of the proposed use restrictions would also be unwise public policy, because they

- do not support the requirement to move to cost-based access rates and would thus preclude a market-based approach to regulating the telecommunications marketplace;
- are inconsistent with basic economic principles and will not promote competitive facilities-based market entry; and
- would reinforce the incumbent LECs' ability to frustrate competition in both the exchange access and local exchange markets.

ARGUMENT

I. THE ACT AND PRIOR COMMISSION PRECEDENT PRECLUDE "USE" RESTRICTIONS ON COMBINATIONS OF NETWORK ELEMENTS

A. As The Commission Has Already Held, Section 251(c)(3) Unambiguously Forbids Any Restriction On A Requesting Carrier's Ability To Use Unbundled Network Elements To Provide Any Telecommunications Service

Section 251(c)(3) provides that incumbent LECs have

> the duty to provide, to any requesting carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements to provide such telecommunications service. 47 U.S.C. § 251(c)(3).

The plain language of this section completely refutes any notion that the proposed "usage restrictions on combinations of unbundled loops and transport network elements" -- or any other technically feasible combination of network elements -- could ever be considered "just and reasonable." The first sentence of section 251(c)(3) expressly provides that any "just and reasonable" "term [or] condition" imposed upon the use of unbundled network elements must be "in accordance with . . . the requirements of this section." That same sentence specifically permits competitive LECs to use network elements to provide any "telecommunications service." Moreover, the very next sentence specifically requires incumbents to permit requesting carriers to combine network elements to provide any "telecommunications service" they choose, and the statutory definitions of "telecommunications" and "telecommunications service" clearly include exchange access services. Hence, any proposed restriction on a requesting carrier's right to use

unbundled network elements to provide exchange access services would directly violate the commands of section 251(c)(3).[2]

Indeed, the Commission adopted this same plain language reading of section 251(c)(3) in *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* First Report and Order, 11 FCC Rcd, 19392 (1996) ("*Local Competition Order*"):

> *First*, the Commission found that section 251(c)(3) is straightforward and "is not ambiguous." *Id.* ¶ 359.
>
> *Second*, the Commission concluded that "Section 251(c)(3) does not impose *any service-related restrictions or requirements* on requesting carriers in connection with the use of unbundled elements." *Id.* ¶ 264 (emphasis added).
>
> *Third*, the Commission held that "incumbent LECs are *required* to allow requesting carriers to combine [network] elements *as they choose*, and that incumbent LECs *may not impose restrictions* upon the uses to which requesting carriers put such network elements." *Id.* ¶ 27 (emphasis added).
>
> *Fourth*, the Commission unequivocally found that "*exchange access and interexchange access are telecommunications services* . . . [and] section 251(c)(3) does not impose restrictions on the ability of requesting carriers 'to combine such elements to provide such telecommunications service[s].' Thus, *we find there is no statutory basis*

[2] "The term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing without changing the form or the content of the information as sent or received." 47 U.S.C. § 153(48). "The term 'telecommunications service' means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the pubic, regardless of the facilities used." 47 U.S.C. § 153(51).

upon which we could reach a different conclusion for the long term." *Id.* ¶ 356 (emphasis added).[3]

More than three years later, nothing has changed that should affect this obviously correct interpretation of the Act.

Based on this plain language reading of section 251(c)(3), the Commission promulgated several regulations that embody the Act's requirements. Those regulations prohibit incumbent LECs from restricting in any manner the types of telecommunications services that competitive LECs can provide using network elements. Specifically,

- 47 C.F.R. § 51.307(c) provides that incumbents must provide an unbundled network element "in a manner that allows the requesting carrier to provide *any* telecommunications service that can be offered by the means of that network element" (emphasis added);[4]
- 47 C.F.R. § 51.309(a) provides that incumbents "shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends"; and

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[3] *See also* Separate Statement of Commissioner Harold Furchtgott-Roth regarding the *Order*, p. 4 ("the statute supplies no basis for restricting a competitor's use of any network element or combination of network elements. The Commission resolved this very question in the *Local Competition First Report and Order,* and there is no reason to revisit the conclusion we reached there. . . . [S]o long as a competitor uses unbundled network elements to provide a 'telecommunications service' – and exchange access is unarguably a telecommunications service – that use is permissible under section 251(c)(3)"); Dissenting Statement of Commissioner Harold Furchtgott-Roth regarding the *Supplemental Order* ("Furchtgott-Roth Dissent"), p. 1.

[4] *See also Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, FCC 99-355 (December 9, 1999) ¶ 31 ("Section 251 requires incumbent LECs to provide unbundled access to a network element where lack of access impairs the ability of the requesting carrier *to provide the services that it seeks to offer*") (emphasis added).

- 47 C.F.R. § 51.309(b) provides that a telecommunications carrier "purchasing access to an unbundled network element may use such network element to provide exchange access services to itself in order to provide interexchange services to subscribers."

These rules were upheld on appeal by the Eighth Circuit.[5] Accordingly, the text of section 251(c)(3), the Commission's prior decisions and its current rules flatly forbid the incumbent LECs' proposed use restrictions on any network element or combination of elements.

B. Section 251(g) Does Not Permit The Proposed Use Restrictions

Section 251(g) of the Act provides absolutely no basis for a contrary conclusion. In an earlier submission to the Commission, SBC argued that use of network elements solely to provide exchange access would be a "violation" of section 251(g),[6] which requires incumbent LECs to "provide exchange access, information access, and exchange services for such access to interexchange carriers . . . in accordance with the same equal access and nondiscrimination interconnection restrictions and obligations (including receipt of compensation) that [applied prior to the Act]." 47 U.S.C. § 251(g). This claim is wrong.

As the Commission previously explained, "the primary purpose of section 251(g) is to preserve the right of interexchange carriers to order and receive exchange access services *if such carriers elect not to obtain exchange access* through their own facilities or *by means of unbundled elements purchased from an incumbent*." *Local Competition Order* ¶ 362 (emphasis added). Moreover, the Commission further found that section 251(g) "does not apply to the exchange access 'service' requesting carriers may provide themselves or others when purchasing unbundled elements." *Id.* Thus, section 251(g) is intended primarily for the benefit of

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[5] *Iowa Utilities Board v. FCC,* 120 F.3d 753, 819 & n.39 (8th Cir. 1997).

[6] August 11, 1999 letter from Martin Grambow, SBC, to Lawrence Strickling, Chief, Common Carrier Bureau, CC Docket No. 96-98 ("SBC Grambow *ex parte*"), p. 6.

interexchange carriers, not incumbents, and it provides no basis for the unwarranted protection against exchange access competition that incumbents seek here.[7]

C. No Other Provisions Of The Act Countenance The Proposed Use Restrictions

Several other provisions of the Act also expressly preclude the restrictions advocated by the incumbent LECs. First, the Act forbids the Commission from forbearing from the requirements of Section 251(c)(3) at this time. *See* 47 U.S.C. § 160(d) ("[T]he Commission may not forebear from applying the requirements of section 251(c) . . . until it determines that those requirements have been fully implemented."). Because section 251(c)(3) expressly authorizes competitive LECs to use network elements to provide any "telecommunications service," permitting incumbent LECs to place use restrictions on competitors' ability to use network elements to provide exchange access would constitute prohibited forbearance. Indeed, the revisionist interpretation of section 251(c)(3) urged by the incumbents is clearly an impermissible attempt at an end run around this prohibition.[8]

Moreover, the use restrictions that incumbent LECs seek cannot be considered a just and reasonable term or condition of providing "network elements," because such restrictions are

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[7] To the extent that section 251(g) does apply to unbundled elements that competitive LECs use to provide access, it merely obligates competitive LECs to pay "compensation" for access services received. This requirement is clearly met by the requesting carriers' payment of the TELRIC rates for network elements, which not only cover the incumbents' costs but also include a reasonable profit. *See* 47 U.S.C. § 252(d)(1). Indeed, the incumbents' argument leads equally to the conclusion that it would be illegal under Section 251(g) for competitive LECs to use network elements to provide exchange access even where they also provide local service. The Commission, however, has squarely rejected this claim, *Local Competition Order* ¶ 362, and even the incumbent LECs have abandoned it.

[8] Incumbent LECs have claimed that Section 4(i) of the Act, 47 U.S.C. § 154(i), independently grants the Commission such forbearance authority. August 9, 1999 letter from William Barfield, BellSouth, to Lawrence Strickling, Chief, Common Carrier Bureau ("BellSouth Barfield *ex parte*"), p. 3. However, this argument cannot withstand scrutiny. Section 4(i) precludes any Commission action that is "inconsistent with this Act," which forbearing from Section 251(c) would be.

inconsistent with the very concept of network elements. The Commission has clearly held that "[w]hen interexchange carriers purchase unbundled elements from incumbents, they are *not* purchasing exchange access 'service.' They are purchasing a different product, and that product is the right to exclusive access or use of an entire element." *Local Competition Order* ¶ 358 (emphasis added). *See also id.* ¶ 264 ("[N]etwork elements are defined by facilities or their functionalities or capabilities, *and thus, cannot be defined as specific services.*") (emphasis added). Thus, the incumbent LECs' proposed use restrictions represent an impermissible attempt to re-define network elements in terms of the services they would prefer to force upon competitive LECs. This is in direct conflict with the functional definition of unbundled network elements the Commission has always applied (*e.g.*, *id.*), which is the only type of definition that is consistent with the language of, and the policies underlying, the Act.

II. IN ADDITION TO VIOLATING THE ACT, THE PROPOSED USE RESTRICTIONS ARE INCONSISTENT WITH BASIC ECONOMIC PRINCIPLES, WILL NOT SUPPORT THE ACT'S REDUCED REGULATION OBJECTIVES AND WOULD IMPAIR COMPETITION; MOREOVER, THEY ARE INCONSISTENT WITH THE ACT'S UNIVERSAL SERVICE SCHEME

A. The Proposed Use Restrictions Would Frustrate Efforts To Achieve Cost-Based Access Rates, Impede Competition And Keep Long Distance Rates Too High

It is indisputable that access charges are well above costs. Although the Commission has declined to prescribe cost-based access charges, it also expects that competition will drive access charge levels toward costs, and it has expressly relied on the availability of network elements to provide such competition. *Access Charge Reform,* First Report and Order, CC Docket No. 96-262, 12 FCC Rcd. 15982, ¶ 262 (1997) ("*Access Reform Order*"). Moreover, section 254(e) of the Act requires that all universal service support must be extracted from access charges, made explicit, and funded in a nondiscriminatory manner. *Texas Office of Public Utility Counsel v.*

FCC, 183, F.3d 393, 425 (5th Cir., 1999). Adopting the proposed use restrictions would be inconsistent with both of these prerequisites to a fully competitive telecommunications market.

The Commission has properly recognized that cost-based access charges -- reinforced with nondiscriminatory universal service support mechanisms -- are not only the law, they are also necessary to establish the economically rational framework that is required to support a fully competitive market for all telecommunications services. *Id.* ¶¶ 42 ("To fulfill Congress' pro-competitive mandate, access charges should ultimately reflect rates that would exist in a competitive market"). Indeed, the Commission has "long recognized that non-cost-based rate structures can, among other dangers, . . . threaten the long-term viability of the nation's telephone systems." *Id.* ¶ 165. It has further recognized that an "inefficient system of access charges retards job creation and economic growth in the nation." *Id.* ¶ 30. Thus, cost-based access rates are also required before the Commission can fully implement the reduced regulatory regime envisioned by Congress. *Id.* ¶¶ 48 ("Where competition has not emerged, we reserve the right to adjust rates in the future to bring them in line with forward-looking costs") & 264; *Local Competition Order* ¶¶ 6-9.

And, of course, non-cost-based access charges are flatly inconsistent with the basic economic conditions that are essential before a fully competitive telecommunications market can begin to operate. *Id.* ¶ 30 (current access structure "generates inefficient and undesirable economic behavior . . . [and] also ha[s] a disruptive effect on competition"). Competitive carriers will not be in a position to make economically rational decisions regarding the markets they would enter, or the types of services and service architectures they will develop, until there is a clear understanding of when the Commission will end its support of non-economic pricing. Thus, the proposed use restrictions would also impede exchange access competition, harm consumers by keeping long distance rates too high, and prevent competitors from making

rational decisions on when to invest in competitive facilities used to provide both local and exchange access services. Such outcomes are directly contrary to the pro-competitive goals of the Act and the Commission itself.

When the Commission, in 1997, declined to prescribe cost-based access rates, it did so on the assumption that market forces would be able to achieve them. Critically, the Commission found that competitive carriers' use of incumbent LECs' unbundled network elements would be an important factor in allowing the market to achieve this economically rational result. *E.g., id.* ¶¶ 262-269. Permitting competitive carriers to use unbundled loops and transport (or unbundled switching and transport) to provide competitive access services for the interexchange traffic of other providers' local exchange customers would allow carriers more quickly and broadly to use network elements to begin the process of "competing away" the incumbents' monopoly access rents and lowering long distance rates. *See* Comments of AT&T Corp. to Update and Refresh the Record, CC Docket No. 96-262, pp. 6-7 (filed October 26, 1998).

Contrary to the incumbent LECs' claims,[9] the proposed use restrictions (which would keep access rates and long distance prices artificially high) will *not* promote the construction of alternate facilities by competitors.[10] The reason for this is simple: a rational business decision to incur the substantial risks and sunk costs of deploying such facilities must be made on the basis of the market prices that would prevail *after* entry, *not* the prices in effect at or *before* entry. Affidavit of Professors Hubbard, Lehr & Willig, CC Docket No. 96-98 ¶¶ 18-19 (filed May 26, 1999). *Accord*, U.S. Department of Justice/Federal Trade Commission, *Horizontal Merger*

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[9] *See, e.g.*, September 8, 1999 letter from Kathleen Levitz, BellSouth, to Lawrence Strickling, Chief, Common Carrier Bureau, p. 1.

[10] Indeed, if this claim were true, competitors would have had even greater incentives to enter the local market in prior years, when access rates were even higher. The lack of alternative local facilities in most locations today demonstrates the flawed logic of the incumbents' argument.

Guidelines § 3.0 (rev. April 7, 1997) ("Firms considering entry that requires significant sunk costs must evaluate the profitability of the entry on the basis of long term participation in the market, because the underlying assets will be committed to the market until they are economically depreciated").

Incumbent LECs already have ubiquitous local exchange networks in place. Thus, the incumbents alone have the luxury of charging supracompetitive prices now for the services a competitive provider may offer using combinations of unbundled network elements and only lowering them toward cost in response to competitive entry in the future.[11] A rational competitor, however, will not deploy new local facilities unless it believes it can recover its costs while competing with the entrenched incumbent at the *lower* prices the incumbent would set in response to such competitive entry.

In sharp contrast, the provision of network element combinations at cost-based rates will significantly promote competition by facilitating efficient entry and exit decisions for competitors, because they will not face the same sunk cost problem. As Professors Hubbard, Lehr, Ordover and Willig have explained:

> CLECs have ample incentive for the self-provision of network elements when it is socially desirable for them to do so, and the availability of UNEs at TELRIC . . . in no way provides entrants with a "free-ride" on incumbent LEC investments. Further, efficiently priced network elements also permit CLECs to enter local markets broadly by combining their own network elements with those of the incumbent LECs, both geographically and functionally. At the same time, because TELRIC-based UNE rates are fully compensatory for the incumbent LECs' bottleneck elements (and those elements linked to the bottleneck), and because the Act's unbundling requirements are . . . firmly linked to the bottleneck properties of the facilities, incumbent LECs experience incentives to deploy new and innovative facilities in response to consumer demand and competition.

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[11] The Commission's recent *Pricing Flexibility Order, Access Charge Reform,* Fifth Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-292, FCC 99-206 (August 27, 1999), allows incumbent LECs that face some competition to offer selective discounts.

Reply Affidavit of Professors Hubbard, Lehr, Ordover and Willig, CC Docket No. 96-98, ¶ 11 (filed June 10, 1999).

In the *Local Competition Order* (¶ 12), the Commission recognized that its role under the Act was not to "express[] a preference for one particular entry strategy" and thus create artificial incentives for competitive LECs to pursue some strategies and reject others. Rather, its job is "to establish rules that will ensure that all pro-competitive entry strategies may be explored" and then let "the market, not . . . regulation," determine which succeeds. *See id.* If, however, the Commission were to adopt the unlawful use restrictions proposed by the incumbent LECs, it would distort the market and create inefficient investment incentives favoring a limited facilities-based short-term entry strategy -- and a narrow class of entrants -- based on the self-serving use restrictions urged by the incumbent LECs.

In addition, the proposed use restrictions would, as a practical matter, invite costly and protracted litigation over whether competitive LECs are providing "significant" local exchange service sufficient to "entitle" them to use network elements to provide exchange access services. *Supplemental Order* ¶ 2. Thus, use restrictions would require competitive LECs to play an endless game of "Mother, may I" with incumbent LECs every time they order combinations of network elements that might be used to compete against an incumbent's access services.

B. Prohibiting Use Restrictions Relating To Special Access Services Would Have No Impact On Universal Service

There is no basis for any claim that use restrictions on the loop and transport elements are necessary so that that incumbent LECs can continue to collect implicit universal service subsidies in current special access rates.[12] It is certainly true that the incumbents' rates for special access are well in excess of cost. *Order* ¶ 494 ("we are cognizant that special access . . .

[12] Continuation of the current temporary use restrictions would directly collide with Section 254(e). *See* Part II.C below.

has historically been provided by incumbent LECs at prices that are higher than the [cost-based] unbundled network element pricing scheme of section 252(d)(1)").[13] However, the fact that prices exceed economic cost does not in itself compel a conclusion that the monopoly profit the incumbents derive is used to benefit universal service; rather, it is merely evidence of the incumbents' monopoly power and their ability to set and enforce uneconomic pricing.

Special access rates in fact do not incorporate *any* mandatory universal service subsidies. Indeed, it is well-established Commission policy that "special access will not subsidize other services." *Access Reform Order* ¶ 404. The *Order* itself (n.994) likewise observes that the Commission's recent notice of proposed rulemaking in the *Seventh Report and Order* "d[oes] not propose to treat special access services as if the current prices of those services included implicit subsidies for universal service." And although the Commission has permitted a small amount of universal service subsidies to remain in special access rates on a discretionary basis, any remaining subsidies exist, by definition, solely as a result of an affirmative choice by an incumbent LEC.[14] Thus, even if a small amount of subsidies remain in special access prices, such optional recovery mechanisms cannot reasonably justify ignoring the statute's requirements or contradicting prior Commission decisions.[15]

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[13] *See also Access Reform Order, supra* ¶¶ 258-84 (recognizing access charges are in excess of costs); *Federal-State Joint Board on Universal Service Reform*, Seventh Report and Order CC Docket No. 96-45 ("*Seventh Report and Order*"), 14 FCC Rcd. 8078, ¶¶ 124-27 (1999) (same).

[14] Any universal service subsidy in special access rates is the result of an incumbent's use of "flowback," which is an additive that the incumbent has chosen to recover through special access rather than exclusively from retail customers. *Federal-State Joint Board on Universal Service and Access Charge Reform*, Sixteenth Order on Reconsideration in CC Docket No. 96-45, Eighth Report and Order in CC Docket No. 96-45, Sixth Report and Order in CC Docket No. 96-262, FCC 99-290 (October 8, 1999).

[15] By AT&T's estimates, less than $90 million of "discretionary" universal subsidies remain in special access charges, a tiny fraction of the more than $5.1 billion in special access charges. Thus, this issue is essentially a red herring.

Given the clear statutory requirement, the Commission also should not tolerate the types of impediments that incumbents have placed in the way of requesting carriers' attempts to obtain both existing and new combinations of unbundled network elements in lieu of access services. Some of the most egregious incumbent LEC practices in this regard include: (1) requiring carriers to litigate their right to these element combinations before state PUCs; (2) requiring that existing combinations of elements must be disconnected and reconnected before they will be treated as unbundled elements;[16] (3) imposing unnecessary administrative burdens on requesting carriers;[17] and (4) attempting to reduce the maintenance and repair support for network element combinations compared to the support provided for access services. Incumbents have also inhibited the purchase of network element combinations by assessing non-TELRIC-based costs for the minimal administrative work necessary to convert existing special access services to unbundled network elements. Accordingly, the Commission must remain vigilant and take "swift enforcement action" when incumbents impose unreasonable costs, delays or administrative burdens upon competitors who are seeking to use unbundled network elements to provide telecommunications services. *See Supplemental Order* n.9.

Similarly, incumbents have inhibited requesting carriers' ability to obtain combinations of unbundled network elements by imposing unreasonable termination liabilities on special access arrangements, even arrangements that were negotiated after issuance of the *Order*.[18] The

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[16] This requirement not only adds unnecessary cost and delay but also threatens customers with the possibility of needless service outages.

[17] Examples include requirements that requesting carriers must (a) obtain new circuit identification for their existing special access circuits when they are migrated to unbundled network elements and (b) change the process they use to order the identical functionality in the form of unbundled network element combinations, even though the processes they are using are consistent with industry standards.

[18] Although the Commission has indicated that "appropriate" termination liabilities might be applied in certain cases (*Order* n.985), permitting an incumbent to impose termination liabilities in a contract negotiated *after* it was placed on notice that use restrictions are at best suspect is

Commission has recently acknowledged that termination liabilities can often be anticompetitive. *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, FCC 99-404 (December 22, 1999) ¶ 389 Thus, the Commission must make clear to incumbents that it will not tolerate any attempts to use excessive termination liabilities as a means of inhibiting competitors' right to obtain unbundled network elements without use restrictions.

C. No Use Restrictions Are Permissible In Any Other Circumstance

Finally, there is no basis to impose use restrictions on any unbundled network elements (or combinations of elements) in any other circumstance, including situations in which requesting carriers would use unbundled transport and switching to originate or terminate interstate toll traffic to customers for whom they do not provide local exchange service. The statutory requirements of section 251(c)(3) apply without distinction to *all* unbundled network elements and *all* combinations of elements.[19] The harms from bloated access rates that the Commission described in the *Access Reform Order* apply equally to switched and special access. Indeed, given the nearly three-to-one ratio in the dollar volume of switched to special access, the market and competitive harms resulting from non-cost-based switched access are significantly greater. Thus, any restriction on requesting carriers' ability to use unbundled network elements

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neither just nor reasonable. Indeed, since the incumbents have been on notice of the clear statutory requirements for nearly four years, the Commission would be fully justified in disallowing *all* termination liabilities in access arrangements negotiated during the past several years in cases where a carrier has sought to migrate such arrangements to unbundled network elements.

[19] *See* Furchtgott-Roth Dissent, p. 1 ("the statute simply does not authorize the Commission to limit the uses to which a competing carrier may put an unbundled network element. . . . Thus, a competitor may use *any* network element or combination of elements in *any* way it wishes, subject only to the requirement that the elements be used to provide 'a telecommunications service'") (emphasis in original).

to provide any telecommunications services -- including all types of exchange access -- are forbidden.

But that does not leave incumbent LECs without protection with respect to potential revenue reductions that may legitimately affect their ability to meet the Act's universal service goals. Section 254 requires the Commission to establish appropriate and sufficient mechanisms to assure the preservation of universal service throughout the country. However, section 254(e) requires that all such universal service support must "be *explicit*." 47 U.S.C. § 254(e) (emphasis added).[20] Indeed, as the incumbent LECs recognize,[21] the Fifth Circuit recently held that "the plain language of § 254(e) does not permit the FCC to maintain *any* implicit subsidies for universal service support." *Texas Office of Public Utility Counsel v. FCC*, *supra* at 425 (emphasis added). Thus, to the extent that current access charges contain universal service subsidies, section 254(e) and the *Texas Office of Public Utility Counsel* decision require that these implicit subsidies must be eliminated and that the Commission create an explicit, non-discriminatory and competitively neutral support fund to recover them in the future.[22]

All other financial impacts that incumbents may face from the application of the plain terms of section 251(c)(3) would simply be the result of market forces at work -- just as the Commission anticipated (and hoped for) in the *Access Reform Order*. As described above, in order to provide appropriate incentives for all carriers and to assure a pro-competitive marketplace for all telecommunications services, cost-based access rates are an absolute necessity. In contrast, allowing incumbents to retain uneconomic monopoly rents that are

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[20] *See also Access Charge Order* ¶ 4.

[21] *See, e.g.*, SBC Grambow *ex parte*, p. 1.

[22] *See* Furchtgott-Roth Dissent, p. 2 ("Since the problem stems from the Commission's rules for access charges, the obvious answer is a prompt review of those rules, so that incumbent carriers are no longer required to include implicit subsidies in their prices for access services" (*citing Texas Office of Utility Counsel*)).

currently embedded in all access charges would frustrate other carriers' ability to compete on a level playing field in both the local and exchange access markets. Moreover, it would enable incumbents to continue to use those uneconomic profits to enrich themselves and to acquire additional assets they can use to fend off economically rational competition in both existing and emerging product markets. The ultimate losers, of course, would be consumers, who would continue to be subject to unnecessarily high prices for long distance calls and deprived of full-fledged competition for all of their telecommunications services.

Accordingly, the remedy to all of the incumbents' concerns regarding use restrictions is for the Commission promptly to take the actions needed to complete the "Competition Trilogy" required by the Act.[23] Significantly, the Commission has an opportunity to accomplish all of these goals. The CALLS proposal currently sponsored by a wide array of major IXCs and incumbent LECs offers the Commission a means to complete the work mandated by the Act nearly four years ago. Thus, although the Commission cannot lawfully impose restrictions on requesting carriers' use of unbundled network elements, it can and should resolve the longstanding debate over a means to implement access and universal service reform by adopting the complete CALLS proposal as soon as possible.

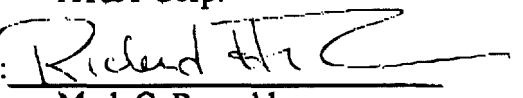
[23] *See Local Competition Order* ¶ 6; *Access Reform Order* ¶ 1.

CONCLUSION

The requirements of section 251(c)(3), which have been in place since 1996, are clear and unambiguous: incumbents may not place any limitations on a requesting carrier's ability to use unbundled network elements to provide any telecommunications service. The Commission simply has no discretion in this regard.

Respectfully submitted,

AT&T Corp.

By: 

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